83-1542

No.

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN POTTS, - - - - - - - Petitioner

versus

UNITED STATES OF AMERICA, - - Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In view of the absence from the Federal Tort Claims Act of language broad enough to indicate that Congress had intended to carve out an exception to governmental liability for all injuries to military personnel incident to their service regardless of any connection to combat-related functions or even military discipline, should this Court abrogate the doctrine of *Feres* v. *United States*, 340 U. S. 135 (1950) or, in the alternative, limit the *Feres* doctrine to preserve governmental immunity only against claims of military personnel for injuries arising from circumstances directly involving military discipline?

2. Should a naval hospital corpsman injured while returning to his post aboard a civilian-run ship from a special shore leave and in circumstances implicating the potential negligence of civilian personnel and not his commander, be permitted to maintain an action against the United States despite the *Feres* doctrine?

Petitioner submits that the answer to both these questions is "Yes."

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No. _____

JOHN POTTS, - - - - - - - *Petitioner*

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

REPORT OF OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in this case was reported as *Potts* v. *United States*, 723 F. 2d 20 (6th Cir. 1983). (It is reproduced as Appendix A of this Petition.) Review was of an unreported memorandum and order of the United States District Court for the Western District of Kentucky at Louisville (Appendix B hereto).

GROUNDS OF JURISDICTION IN THIS COURT

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). The case of which petitioner seeks review was decided and the opinion filed on December 19, 1983.

STATUTES WHICH THE CASE INVOLVES

The case involves the following statutes, the pertinent parts of which are reproduced in Appendix C to this Petition:

(1) Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680.

(2) Suits in Admiralty Act, 46 U.S.C. §§ 741-752.

(3) Public Vessels Act, 46 U.S.C. §§ 781-790.

STATEMENT OF THE CASE

This case involves a claim of a naval hospital corpsman, John Potts, against the United States under the alternative remedies of the Suits in Admiralty Act or the Public Vessels Act, for personal injuries sustained during his return to his post aboard a civilian-operated ship from an off-duty personal errand authorized by his commander.

On September 3, 1980, the date of the accident in which Mr. Potts was injured, Mr. Potts (now retired) was an Independent Duty Hospital Corpsman, Chief Petty Officer, in the United States Navy. He had the duties of a civilian ship's nurse aboard the USNS Chauvenet, a public vessel of the United States. The Chauvenet was commanded by a civilian Master and operated by a civilian crew, but was contracted to the service of the Navy's Military Sealift Command to conduct various oceanographic survey operations in Indonesian waters. The mission was primarily to promote better relations between the United States and

Indonesia. The naval unit aboard the Chauvenet, Oceanographic Unit Four, was generally involved only in conduct of oceanographic tests and hydrographic surveys, and not in the operation of the Chauvenet. Civilians were responsible for all navigation, vessel maintenance, underway time, and everyday ship's duties.

On September 2, 1980, Mr. Potts received permission from the Commanding Officer of Oceanographic Unit Four, Cdr. Paul G. Gaffney II, and from the civilian ship's Master, Richard W. Gregg, for leave from his duties the next day to visit a personal friend, Dr. Donald Dawson, employed by the Union 76 Oil Company Clinic in Balikpapan, Indonesia. Mr. Potts presented Dr. Dawson a ship's plaque as a token of their friendship and in thanks for past aid. Mr. Potts obtained the ship's plaque from Cdr. Gaffney, who maintained that Mr. Potts was under his orders to deliver the ship's plaque to Dr. Dawson, but Mr. Potts maintained he was on leave and not under orders. The latter state of facts was assumed in both the district court and the Sixth Circuit for purposes of the government's motion for summary judgment based on the *Feres* doctrine.

After his visit ashore Mr. Potts returned to the LCVP II, a motor launch assigned to the Chauvenet and often used to transport both servicemen and civilians to and from shore for recreation, leave of absence, social visits and other off-duty activities. Whereas a naval officer not fully trained in navigation

was assigned as LCVP II boat officer, the entire responsibility for hoisting the launch aboard the Chauvenet lay with the civilian crew on duty. While these civilians were attempting to hoist the launch aboard the Chauvenet (without first disembarking the passengers), two of the "bridle legs" (hoisting cables) broke and the LCVP II fell back into the water. In the course of the accident one of the broken cables whipped through its pulling mechanism and struck Mr. Potts, severing his left hand nearly competely at the wrist and fracturing his left femur just as he was pushing the boat officer out of the swath of the cables.

During rescue operations Mr. Potts was pinned helpless beneath the wreckage of the launch for half an hour. He was taken to the Union 76 clinic at Balikpapan for emergency treatment and then flown to Singapore for surgery consisting of reattachment of his left hand and insertion of a steel pin to repair his left femur.

Mr. Potts ultimately received disability benefits of 70% of base pay based upon 70% disability. Because he took disability retirement after 20 years' active service (for which he would have been entitled in any case to a veteran's benefit of 50% of base pay), his compensation for the injuries in question extends only to 20% of base pay for severe injuries from which he has continued to suffer. The surgery was only moderately successful and left Mr. Potts' injured left leg over one inch shorter than his right leg. The fracture

has not healed correctly. Mr. Potts' reattached left hand has only limited use.

Because of the modest level of compensation for Mr. Potts' injuries and because his injuries appeared to have been caused either by the unseaworthiness of a public vessel of the United States or by the negligence of civilian agents or servants of the United States, or both, Mr. Potts brought this action in June 1982. By then Mr. Potts resided in Louisville, Kentucky, and jurisdiction and venue were premised alternatively on 46 U.S.C. § 742 or 46 U. S. C. § 782. The district court, however, granted a government motion for summary judgment on the basis that *Feres* bars the action. The Sixth Circuit has since affirmed.

REASONS THE WRIT SHOULD BE ALLOWED

This case presents issues regarding the *Feres* doctrine of this Court—some not yet resolved by this Court and others seemingly all too well carved in stone—that this Court should review. Indeed, with all due respect, considerations of justice, fairness and consistent statutory interpretation suggest that this Court's re-examination of the premises underlying *Feres* is long overdue. This case would be an eminently appropriate vehicle for that re-examination.

Here the Sixth Circuit extended the bar of the *Feres* doctrine, without any qualification, to claims brought under the Suits in Admiralty Act and the Public Vessels Act. The circuit court simply followed similar conclusions reached in the Second, Fourth, and Ninth Circuits without analysis whether there is any

warrant in the language of those statutes for extending *Feres* to cover a claim in which no effect on military discipline has been demonstrated. There is no such warrant.

Of course, this Court has not withdrawn or substantially restricted those rationales underpinning *Feres* that do not touch the question of military discipline. However, as will be demonstrated, there are reasons for doing so in this very case, reasons compelling in their appeal to fairness and equity.

In short, this Court should grant certiorari to consider: (1) whether this case should be controlled by *Brooks* v. *United States*, 337 U. S. 49 (1949), not *Feres*, and whether the broad application of *Feres* has all but swallowed up *Brooks*; (2) whether the near-illimitable application of *Feres* for over 30 years was ever really justified in the language of the Federal Tort Claims Act ("FTCA"), particularly in non-FTCA claims; and (3) whether the *Feres* bar should be limited to claims affecting military discipline, or be abrogated altogether in view of the adequacy and far greater fairness of applying, in lieu of *Feres*, the "discretionary function exception" of 28 U.S.C. § 2680(a) to claims of servicemen.

I. This Case Should Be Controlled By *Brooks*, Not *Feres*.

This case, like *Brooks*, involved a serviceman who was injured while on a form of leave, not on duty status. Nevertheless, Mr. Potts' claim fell victim to the *Feres* bar because the district court and the Sixth Circuit viewed his injuries as "incident to service."

The Sixth Circuit applied *Feres* despite this case being a near-perfect maritime analogue to *Mills* v. *Tucker*, 499 F. 2d 866 (9th Cir. 1974), in which the Ninth Circuit held that an FTCA claim on behalf of a naval petty officer killed enroute from leave back to base over a Navy-maintained road was controlled by *Brooks* and not *Feres*, thus allowing the claim to proceed. *Accord*, *Knecht* v. *United States*, 144 F. Supp. 786 (E.D. Pa. 1956), *aff'd*, 242 F. 2d 929 (3d Cir. 1957).

Mr. Potts' claim points up, as other claims often have not, the practical effect this Court presumably never intended in its enunciation of the "incident to service" test—the virtually total eclipse of *Brooks* by *Feres*. As the Circuit Court noted in *Hunt* v. *United States*, 636 F. 2d 580, 587 n. 16 (D.C. Cir. 1980); "Most lower courts have applied the *Feres* doctrine with a vengeance, rejecting virtually all claims based on injuries suffered while on active duty status." The "incident to service" language is, with all due respect, so imprecise that practically any connection of the circumstances of an injury to active-duty military service can be rationalized to bar a claim under *Feres*. *See, e.g.*, *Hale* v. *United States*, 416 F. 2d 355, 358 (6th Cir. 1969) (*Hale* I). While the Sixth Circuit and many other courts have endeavored to draw from the language a fairer standard, the bias of the very language of the test is against a *Brooks*-controlled result. *Feres*, it must be remembered, is a judicially-created exception to FTCA liability of the government, but it has evolved into the classic example of the exception that swallowed up and became the rule.

II. The *Feres* Bar, Whether Applied Under the Federal Tort Claims Act or Other Statutes, Has No Supportable Basis Beyond the Preservation of Military Discipline.

This petitioner is under no illusion regarding the need of the government for statutory or judicial protection against claims of servicemen which would disrupt discipline within the armed services. *Feres*, however, as presently applied, goes far beyond the bounds of that legitimate need and insupportably beyond the statute, to produce anomalous and unfair results in cases where military discipline is not an issue.

The need to restrict the application of *Feres* to cases where its rationale is not strained becomes ever greater as this Court applies *Feres* beyond its original FTCA context. In particular, this Court's recent extension of *Feres* in *Chappell* v. *Wallace*, ___ U. S. ___, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983), to bar a constitutional remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U. S. 388 (1971) under the particular facts of *Chappell*, could be justified *only* under the rationale of protecting military discipline. The same is true of any extension of *Feres* this Court may ultimately sanction to claims like that of Mr. Potts, arising under either the Suits in Admiralty Act or the Public Vessels Act.

The doctrinal underpinnings of *Feres* unrelated to military discipline either have been discredited or do not apply to a claim such as that of Mr. Potts, or both. First, the "federal law-local law" distinction of *Feres* with regard to inconsistent local standards for tort

claims under the FTCA has no application to federal maritime claims which are not subject to the vagaries of local law. (One might expect injured servicemen to be willing to take their chances with local law rather than having their FTCA claims barred altogether). Second, the rationale of a generous military compensation scheme of veterans' benefits does not stand up to scrutiny, despite this Court's continued reference to it in *Stencel Aero Engineering Corp.* v. *United States*, 431 U. S. 666 (1977). Contrary to a suggestion in *Stencel*, 431 U. S. at 673, that the military compensation scheme comprehends a limitation of liability under either the FTCA or the Veterans' Benefits Act, 38 U.S.C. §§ 101 *et seq.*, the statute has no exclusive remedy provision (unlike its civilian counterpart, the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8152, with an express limitation of liability at 5 U.S.C. § 8116(c)). Indeed, this Court long ago described veterans' compensation as "a mere gratuity for which no suit can be maintained." *Silberschein* v. *United States*, 266 U. S. 221, 225 (1924). Moreover, in light of the deduction of Mr. Potts' military retirement benefits from his disability award, the compensation attributable to his injuries can scarcely be termed "generous" compared to any standard but that of *damnum absque injuria*. If Mr. Potts had been a 30-year active service veteran instead of having 20 years' service, with a military retirement based upon 75% of base pay rather than 50%, his 70% disability retirement would have been fully offset by military retirement, leaving no compensation with respect to his in-

juries other than continued but non-guaranteed access to veterans' hospitals and medicine.

This Court should at least limit *Feres* to apply only in cases implicating military discipline. There is simply no warrant in the FTCA, nor in the legislative history evidencing Congressional intent, for the total bar that *Feres* has become against claims for injuries "incident to service."

This Court recognized in *Brooks, supra,* that the overseas and combat activities exceptions to the FTCA showed that Congress had servicemen squarely in mind and knew what it was about when it used the term "any claim," and the Court was "not persuaded that 'any claim' means 'any claim but that of servicemen.' " 337 U. S. at 51. Yet this restraint upon the application of a serviceman's exception to FTCA liability has been wholly submerged ever since *Feres,* as the lower courts have focused upon the "incident to service" language irrespective of *why,* in any given case, a nexus to the injured person's service should be applied to bar a claim. The result has been to belie this Court's careful exigesis of the statute in *Brooks,* and over a 30-year period to legislate a comprehensive "service-related" exception that nevertheless has not yet appeared in the statutes as "28 U.S.C. § 2680(o)."

That is why redress for Mr. Potts and others unfairly barred by *Feres* can lie only with this Court, not with Congress. This Court has already cut back upon the *Feres* doctrine once, by removing in FTCA cases as a whole the "analogous private liability" requirement. *See, Rayonier* v. *United States,* 352 U. S. 315, 319

(1957); *Indian Towing Co.* v. *United States*, 350 U. S. 61 (1955). That limitation of *Feres* has accomplished little or no amelioration of the unwarranted harshness of the doctrine as applied in the courts. The doctrine should now be limited further to its sole legitimate purpose—the protection of military discipline.

III. The *Feres* Doctrine Should Be Limited to Claims Affecting Military Discipline or Should Be Replaced By the Discretionary Function Exception to Federal Tort Claims Act Liability.

This Court is doubtless fully aware of the extensive criticism of the *Feres* doctrine in legal academic circles, not to mention litigants seeking to avoid its broad sweep. *See, e.g.*, Note, "From *Feres* to *Stencel*: Should Military Personnel Have Access to FTCA Recovery?" 77 Mich. L. Rev. 1099-1126 (Apr. 1979). Few decisions of this Court can have produced such harsh, illogical and widely divergent results, and conflicting lines of interpretation, as has *Feres*.

Without reference to a logical limiting principle, such as the need to preserve discipline, the *Feres* doctrine may bar a claim by a serviceman or servicewoman for injuries suffered when a government aircraft crashes into barracks or other on-base housing, yet not bar such a claim if by fortuity a government aircraft instead crashes into off-base private housing occupied by service personnel. In cases similar to that of Mr. Potts or else involving servicemen departing for leave rather than returning, lower courts have also applied crude distinctions based upon whether the injuries to the serviceman occurred on-base or off-base. *See, e.g.*,

Zoula v. *United States*, 217 F. 2d 81 (5th Cir. 1954). Such utterly unfair distinctions cannot ever have been intended by this Court.

This Court can remove the element of arbitrariness that now pervades application of the *Feres* doctrine simply by limiting the doctrine to claims in which the circumstances of the injuries bring into question the preservation of military discipline (as argued above). The emphasis of this Court in *Chappell* v. *Wallace*, *supra*, upon the military discipline rationale as the best explanation of *Feres* serves well as a basis for such a ruling, especially since the *Chappell* question of the extension of *Feres* to constitutional claims is the truest test of what rationale properly supports *Feres*.

Another alternative would be to subsume the *Feres* doctrine within the "discretionary function" exception to the FTCA, or, where *Feres* is thought to apply outside the FTCA, render *Feres* coextensive with the discretionary function exception. Government vulnerability to suit would arise only at the "operational" level as opposed to the "planning" level or policy-making functions of the military. That would be so whether the planning or discretion is embodied in acts of Congress, regulations of the various armed services, or, for that matter, orders of individual commanders involving general or specific standards for local operations. Application of the 28 U.S.C. § 2680(a) exception within the military context to replace *Feres* might include the following lines of inquiry: (1) Did the injury arise due to a decision or action requiring professional military expertise or judgment? (2) Are

there significant disciplinary reasons to bar the claim? (3) Does a statute or military regulation prescribe a standard of conduct? (4) Did the injury arise due to a military or national emergency that would justify a lower standard of care? *See*, Note, *supra*, 77 Mich. L. Rev. at 1121-1125.

Either of these alternatives would be preferable to and far more equitable than the present unbridled application of the *Feres* doctrine, which in effect penalizes many injured service personnel because their injuries were "incident to service" only in that they happened to occur while these citizens were on active duty in the military. Mr. Potts was unlucky enough to have been injured while returning from leave to his ship rather than on the island at Balikpapan, where a government-caused injury might have been compensable. The operation of chance in such affairs can never be eliminated, but at the least a bar to suit such as that in *Feres* should be conducive either of stated Congressional intent or of a rational, well-articulated governmental policy such as the preservation of military discipline. *Feres* now is neither. It is random and far harsher than military prerogatives require. The doctrine should be altered or abrogated so as to answer only its valid purpose. In the case of Mr. Potts, the absence of a remedy for grotesque injuries suffered in open view of an entire ship's company apparently stemming from irrefutable negligence of non-military personnel can scarcely be thought to have a salutory effect on military esprit and discipline, the very values *Feres* should be fashioned to protect.

CONCLUSION

For all the foregoing reasons, this Court should grant a writ of certiorari to this petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 82-5764

JOHN POTTS, - - - - - - *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, - - *Defendant-Appellee.*

On Appeal from the United States District Court for the Western District of Kentucky, At Louisville

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OPINION—Decided and Filed December 19, 1983

Before: KENNEDY and MERRITT, Circuit Judges; and PRATT,* District Judge.

PER CURIAM. John Potts appeals a summary judgment for the United States on his claim for damages for injuries sustained while a corpsman in the United States Navy. We affirm the decision of the District Court.

Potts was injured when a cable used for hoisting a naval landing craft onto the USNS Chauvenet snapped and struck him. Potts was at the time a medical corpsman in the U.S. Navy stationed aboard the Chauvenet, an oceanographic research vessel contracted to the service of the Department of the Navy's Military Sealift Command. The crewmen operating the hoist were civilians. The Chauvenet was in

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*Honorable Philip Pratt, United States District Court for the Eastern District of Michigan, sitting by designation.

Indonesian waters at the time of the accident. Potts had been ashore in Indonesia on leave to present a plaque to a civilian physician friend, a Dr. Dawson. The accident occurred as Potts was returning to the Chauvenet in the naval landing craft.

Potts brought this action to recover for his injuries[1] under the Public Vessels Act (PVA), 46 U.S.C. §§ 781-790, and the Suits in Admiralty Act (SAA), 46 U.S.C. §§ 741-752. The District Court in dismissing the action relied on *Feres* v. *United States*, 340 U.S. 135 (1950). *Feres* holds that a serviceman may not recover under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671 *et seq.*, for injuries incident to his service.

Potts first argues that summary judgment was inappropriate because there was a question of fact as to the nature of his activity ashore, and that the answer to this factual question determines whether or not his injuries were incident to his military service. Potts relies upon *Hale* v. *United States*, 416 F. 2d 355 (6th Cir. 1969). Hale was on leave from his army base. While he was trying to hitch a ride back to the base Hale was stopped by miltary police in an army truck. The police told him to get into the truck to ride back to the base. Hale was struck by a civilian vehicle as he was going around the army truck in order to enter it. The District Court dismissed Hale's case on summary judgment for the United States, but the Sixth Circuit remanded the case for an evidentiary hearing on the question of whether Hale's injuries arose out of or in the course of military duty.[2] 416 F. 2d at 360.

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[1]Potts' left hand was nearly severed and his left femur was fractured. He is now receiving 70% of his base pay by reason of his 70% disability.

[2]The District Court on remand concluded that Hale's injuries had arisen in the course of military duty. The Sixth Circuit affirmed in *Hale* v. *United States*, 450 F. 2d 960 (6th Cir. 1971).

Hale is inapposite to Potts' case. Potts was injured while aboard a U.S. Navy landing craft commanded by Navy personnel. There is clear case law indicating that "an injury to an active duty service member . . . while aboard military craft . . . is deemed to be incident to military service." *Woodside* v. *United States*, 606 F. 2d 134, 142 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980); *Uptergrove* [*sic*] v. *United States*, 600 F. 2d 1248 (9th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980). The result is the same even when the service person is on leave at the time of the accident. *Uptergrove* [sic], 600 F. 2d at 1250; *Herreman* v. *United States*, 476 F. 2d 234, 237 (7th Cir. 1973). *Potts* was on a military craft when he sustained his injuries and this is dispositive of the question of whether his activity was incident to his military service. Moreover, his presence there was for the purpose of returning to his duty station on the USNS Chauvenet. Consequently, the nature of Potts' business ashore is irrelevant for purposes of determining the liability of the United States for Potts' injuries. The District Court was correct in concluding that there were no questions of fact in Potts' case.

Potts contends that *Brooks* v. *United States*, 337 U.S. 48 (1949), applies to his case. In *Brooks* the Court allowed a soldier to sue the United States under the FTCA. The soldier was injured while off base on furlough when his civilian vehicle was struck by an army truck. However, the Court held one year later in *Feres* v. *United States*, 340 U.S. 135 (1950), that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of activity incident to service." 340 U.S. at 146. The Court discussed *Brooks* at length and distinguished it, noting that the "injury to Brooks did not arise out of or in the course of military duty." *Id.* Potts' injuries were incident to his military

service, under *Woodside*. Consequently, the *Feres* doctrine, rather than the *Brooks* doctrine, applies to this case.

Potts next argues that *Feres* should be limited in its application to non-FTCA cases. Though *Feres* dealt specifically with the FTCA, courts have held the doctrine applicable to admiralty tort claims for injury or death incident to military service brought under the PVA and the SAA. *Cusanelli* v. *Klaver*, 698 F. 2d 82, 85 (2d Cir. 1983) (*Feres* applicable to PVA and SAA); *Charland* v. *United States*, 615 F. 2d 508, 509 (9th Cir. 1980); (*Feres* applicable to PVA); *Beacoudray* v. *United States*, 490 F. 2d 86 (5th Cir. 1974) (*Feres* applicable to PVA and SAA).[3] The Ninth Circuit in *Charland* stated:

> We are persuaded that such an application [of the *Feres* doctrine to the PVA] is fully consonant with the Supreme Court's holding in *Feres* that the government's consent to suit in the Federal Tort Claims Act does not extend to actions by servicemen for injuries arising out of activity incident to service. The rationale supporting the ruling in *Feres* limiting the waiver of sovereign immunity applies with equal force in the context of governmental liability in admiralty.

615 F. 2d at 509.

Accordingly, the judgment of the District Court that Potts' suit is barred under *Feres* is affirmed.

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[3]The government also cites *Lockheed Aircraft Corp.* v. *United States*, ____ U. S. ____, 103 S. Ct. 1033 (1983), for the proposition that the government's liability under the FTCA is congruent with that under the PVA. *Lockheed* holds that the exclusive liability provision of the Federal Employee's Compensation Act, 5 U.S.C. § 8116(c), applies to suits under both the FTCA and the PVA without distinction.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 82-0324-L(B)

JOHN POTTS - - - - - - - - - *Plaintiff*

v.

UNITED STATES OF AMERICA - - - - - *Defendant*

MEMORANDUM—Filed November 15, 1982

John Potts has brought the present action seeking damages from the United States for personal injuries he sustained while he was in the process of boarding a vessel owned and operated by the United States. The claim is pursued under the Suits in Admiralty Act (46 U.S.C. Sections 741-752) and the Public Vessels Act (46 U.S.C. Sections 781-790). The matter is before the Court on the motion of the defendant United States for summary judgment.

The affidavit of Potts provides the salient facts, which are taken as true for purposes of consideration of the summary judgment motion. The accident occurred on September 3, 1980. Potts was a Chief Petty Officer in the United States Navy. His permanent duty station was Oceanographic Unit Four, "attached to and embarked in USNS Chauvenet." Potts acted as the ship's nurse.

The Chauvenet was a civilian operated public vessel of the United States and was involved in oceanographic survey operations for the Navy. The Chauvenet was anchored off Balikpapan, Indonesia. The master and the crew of the

Chauvenet, who were responsible for all navigation, vessel maintenance and ship's duties, were civilians, numbering from 60 to 80 persons. They were equalled in number by the naval personnel who conducted the various oceanographic tests which were primarily for the purpose of promoting better relations between the United States and Indonesia.

Potts requested and was granted leave from his duties "for time necessary to complete a personal visit" to a friend in Balikpapan. That the trip was not incident to a command from his superior is disputed. However, for reasons set forth in this memorandum, this dispute does not create an issue of material fact which would preclude the entry of a summary judgment. F.R.Civ.P. 56 (c).

Potts arrived on shore, made this visit and returned to LCVP II, a motor launch "assigned to and in the service of" the Chauvenet. The LCVP II frequently was used to transport ship's personnel between the Chauvenet and shore in order for those persons to engage in various recreational and other non-military activities. After the LCVP II returned to the Chauvenet, the civilian crew began to hoist the launch aboard. Potts suffered serious injuries when two cables broke and the launch fell.

In its motion for summary judgment, the United States argues that the claim of Potts is barred by the doctrine of *Feres* v. *United States*, 340 U.S. 135, 71 S.Ct. 153 (1950). *Feres* held at 146 that the United States, "is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Potts responds that the *Feres* doctrine is not applicable because his claim was brought pursuant to the Public Vessels Act (PVA) and not the Federal Tort Claims Act (FTCA). Further, Potts contends that his fact situation is not within the ambit of *Feres*, but rather is consistent with the line of cases allow-

ing recovery, that is, *Brooks* v. *United States*, 337 U.S. 49, 69 S.Ct. 918 (1949), *United States* v. *Brown*, 348 U.S. 110, 75 S.Ct. 141 (1954), and their progeny.

The *Feres* doctrine has been held to apply to the PVA. *Beaucoudray* v. *United States*, 490 F. 2d 86 (5th Cir. 1974), *Charland* v. *United States*, 615 F. 2d 508 (9th Cir. 1980). Even before *Feres*, however, in *Dobson* v. *United States*, 27 F. 2d 807 (2nd Cir. 1928), *cert. denied*, 278 U.S. 653, 49 S.Ct. 179, no recovery was allowed, under the PVA, to the survivors of three naval officers who were killed when the submarine to which they were assigned sank. The *Dobson* court determined that the United States had consented only to be sued by third persons who were injured, not by members of a ship's company, thus leaving the members of the naval forces with the same risks and compensation possibilities incident to their service as they had before the PVA.

The *Feres* case indicated that Congress had not envisioned a cause of action under the FTCA for service related injuries, because no provision had been made to harmonize the Act with the other methods of compensation available to a serviceman. Such reasoning is in line with the *Dobson* analysis of the PVA. This reasoning was undercut to a degree by *United States* v. *Brown*, *supra*, which held that a serviceman may receive compensation and pursue a remedy under the FTCA. However, such an election is only available for injuries which are not incident to service. Therefore, especially in light of the fact that Potts has cited us to no authority to the contrary, it is still a logical conclusion that Congress indicated no awareness in enacting the PVA or the FTCA that the Acts would be interpreted to permit recovery for injuries incident to military service. The *Feres* doctrine is applicable to the PVA.

Potts insists that even if *Feres* applies to the PVA, his injury was not suffered in an activity incident to his service, but resulted when he was on a leave of a purely personal nature. The United States contends that he was sent ashore by his commanding officer. The purpose of his visit to shore is of no consequence here, because by boarding the LCVP II, Potts again entered a direct disciplinary relationship with his command. *Hale* v. *United States*, 452 F. 2d 668 (6th Cir. 1971). Any injury which Potts suffered after re-entering that relationship was incident to his service in the Navy.

In *Hale*, the soldier was on leave. He stepped from the curb of a public street to approach a military police truck which was stopped in the driving lane. The soldier was moving to the rear of the truck when he was struck by a civilian vehicle. The *Hale* court held, at 669, ". . . that when appellant started to enter the M.P. truck, whether as a result of invitation or command, he re-entered a direct disciplinary relationship with his army command. . . ." Like the soldier in *Hale*, Potts again had come under naval supervision. The fact that the actual injury may have been at the hands of a civilian, whether the driver of a car or a crew member of the Chauvenet, is of no significance so far as the liability of the United States is concerned, once that service relationship has been established.

The *Feres* doctrine was applied even more broadly in the case of *Woodside* v. *United States*, 606 F. 2d 134 (6th Cir. 1979), *cert. denied*, 444 U. S. 1081, 100 S.Ct. 1034. In *Woodside*, an Air Force captain was killed when the plane he was piloting crashed. The captain held a private pilot's license and was a member of a flying club in which membership was available primarily to miiltary personnel. He was flying with a civilian instructor from the club's flight school when the crash occurred. Recovery against the United States was denied because his death was deemed incident

to military service, even though not directly related to "the mission of the military." *Id.* at 142.

Potts stated in his affidavit that the oceanographic tests being performed by the Navy personnel aboard the Chauvenet were for the purpose of promoting better relations between the United States and Indonesia. He does not seriously argue, however, that the oceanographic mission was not a military one. Even if this were the case, his assignment to the Chauvenet and his presence in the LCVP II at the time of his injury was certainly "an activity provided directly by the military or where there is substantial involvement by the Armed Forces. . . ." *Id.* at 142.

Potts cites the line of cases which applied *Brooks* rather than the *Feres* doctrine and allowed recovery to servicemen because their injuries arose out of activity which was not incident to their military service. Those cases involve activity which occurred away from the servicemen's assigned posts when those persons were not re-entering the disciplinary relationship referred to in *Hale, supra.* Potts contends that *Mills* v. *Tucker,* 499 F. 2d 866 (9th Cir. 1974), is nearly identical to his case, but we cannot agree. *Mills* was killed when his motorcycle was struck by a car. The accident occurred on a road maintained by the Navy and at a time when Mills, who was on furlough, was returning from a civilian job to his Navy-owned quarters for his son's birthday party. Mills was going from one personal activity to another by way of his privately owned motorcycle. He happened, though, to have been on a Navy-maintained road.

Potts recounted in his affidavit that he requested leave for "time necessary to complete a personal visit." That visit was admittedly completed and Potts had returned to the LCVP II which was assigned to the Chauvenet and under the command of Navy personnel. Potts was not going to another personal activity, nor was he still enroute

to his station. Once he boarded the LCVP II he had returned to his post. There is no contention that he could have returned to shore without additional authorization, the purpose of his previous authorization for leave having been accomplished. As Potts was injured as a result of an activity incident to service, the *Feres* doctrine clearly stands as a bar to his claim.

The motion of the United States for summary judgment will be granted and an appropriate order has been entered this date.

November 15, 1982

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 82-0324-L(B)

JOHN POTTS - - - - - - - - - *Plaintiff*

v.

UNITED STATES OF AMERICA - - - - - *Defendant*

ORDER—Entered November 15, 1982

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the motion of the defendant, United States of America, for summary judgment on the claim of the plaintiff, John Potts, against it be and it is hereby granted, and this action is dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable Order.

This 15th day of November, 1982.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

APPENDIX C

28 U.S.C. § 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. . . .

. . . .

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States. . . .

. . . .

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country. . . .

. . . .

June 25, 1948, c. 646, 62 Stat. 984; June 16, 1949, c. 340, 63 Stat. 444; Sept. 26, 1950, c. 1049, §§ 2(a)(2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub. L. 86-168, Title II, § 202(b), 73 Stat. 389.

46 U.S.C. § 742. Libel in personam

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate noninjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the Uinted States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in

the discretion of the court, be transferred to any other district court of the United States.
March 9, 1920, c. 95, § 2, 41 Stat. 525; Sept. 13, 1960, Pub. L. 86-770, § 3, 74 Stat. 912.

46 U.S.C. § 781. Libel in admiralty against or impleader of United States

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.
March 3, 1925, c. 428, § 1, 43 Stat. 1112.

46 U.S.C. § 782. Venue of suit; application of provisions of chapter 20

Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.
Mar. 3, 1925, c. 428, § 2, 43 Stat. 1112.

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